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Supreme Court of the United States

OCTOBER TERM, 1929.

No. [redacted] 47

FULLERTON LUMBER COMPANY,

Petitioner,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.*

Your petitioner, Fullerton Lumber Company, respectfully states that it is greatly aggrieved at the rendition on the 15th day of November, 1929, of a judgment of the United States Circuit Court of Appeals for the Eighth Circuit against it in favor of the respondent, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, in the sum of $375.96, together with interest and costs (R. ....).

Your petitioner respectfully states that this is a case brought by the railroad evidently to establish a new and novel proposition of law to the effect that checks cannot be used by shippers in connection with payment of freight bills, and to engraft into the law a new and hitherto undecided doctrine to the effect that a carrier is immune from

*References herein are to the pages of the Printed Record.

the ordinary liabilities which follow the mishandling of a check by him who receives it in payment of an obligation, as prescribed and laid down by the generally accepted rules of the Law Merchant. The case also involves the determination of a conflict in the decisions of the United States District Courts upon the question whether a counter-claim may be interposed in an action for freight charges brought by a common carrier, a question decided for the first time by a Circuit Court of Appeals in this case, and which question we believe has never been considered or decided by this Court. While the amount involved is comparatively small the effect of the judgment is far-reaching and the case is an important one, not alone to your petitioner but to all carriers and shippers. If the judgment of the Circuit Court of Appeals stands, it necessarily means a widespread change in the relationships of carriers to their patrons and will require shippers to accept a burden and a liability which has not hitherto been upon them.

Your petitioner now prays this Honorable Court for a writ of certiorari so that said judgment may be reviewed and reversed.

Your petitioner shows that this action was brought by the respondent against petitioner in the United States District Court for the District of Minnesota to recover the freight charges on the shipment of a carload of coal transported from Norfolk, West Virginia, to Kimball, South Dakota, over railroad lines of which respondent formed the last carrier. The coal arrived at Kimball on June 16, 1926, consigned to petitioner, it was delivered and on June 19, 1926, respondent's agent presented the freight bill to petitioner's agent for payment. This freight bill was then and there paid by the delivery to the carrier of a proper check on the Lumbard State Bank of Kimball for the correct

amount, and the freight bill was receipted and delivered by the agent of respondent to petitioner's agent. Instead of presenting the check for payment not later than the next succeeding business day, as the Law Merchant requires, respondent's agent sent it on a nine days' journey, first sending it to Chicago for deposit. Six days after the check was given, the Lumbard State Bank of Kimball closed its doors. Nine days after delivery the check reached Kimball and was dishonored when presented for payment to the bank on which it was drawn. Claiming that it is under no responsibility for its wrongful dealing with the check, respondent demanded that petitioner pay over again the sum of $375.96, the amount of the freight bill, and upon petitioner's refusal respondent brought this action in the United States District Court for the District of Minnesota to recover that amount. It is practically conceded that, were respondent an individual, he could not recover; that the law is settled that he who negligently fails to present the check promptly must stand the loss thereby caused, and that the check thereby operates as absolute payment. But the carrier contends that it is above and beyond this salutary rule, is not bound thereby, and that it can recover even though its own wrongful act was the cause of the loss. No decision to this effect is cited by the carrier, but it contends that it has the same immunities from liability as a sovereign government in collecting taxes, and cites the South Dakota case of *Eggleston vs. Plowman*, 49 S. D. 609, 207 N. W. 981, by analogy. It also insists that Interstate Commerce Commission Conference Ruling 207, adopted September 15, 1926, providing that nothing but money can be received in payment for transportation, governs the case, the argument being that a check is not money and, therefore, that it makes no difference how wrongfully the carrier

dealt with the check after it had received it. Petitioner contends that there is neither authority nor reason for giving to a private, profit-making carrier corporation the immunities of a government collecting taxes, and that the argument founded on Interstate Commerce Commission Ruling 207 is beside the point, for a check is not an uncertain claim for personal injuries (*Louisville & Nashville Railway Company vs. Motley*, 219 U. S. 467), nor is it magazine advertising of uncertain value (*Chicago, Indianapolis and Louisville Railway Company vs. United States*, 219 U. S. 486), nor is it a map or other property of uncertain worth sought to be traded for passenger rides (*New York Central & Hudson River Railroad Company vs. Gray*, 239 U. S. 583), but it is an order, ready to be promptly honored, for United States currency of exact amount, or gold or silver coin, upon proper presentation by the holder thereof, and petitioner contends that the sole and only reason why the carrier failed to receive gold, silver, greenbacks, or whatever it thought it ought to have in discharge of this freight bill is its own failure to take a five minute walk to the bank, present the check and get the currency there awaiting such proper presentation.

The case was tried to the Court, Honorable Charles A. Dewey, Judge, as a result of which the Court upheld the contentions of the carrier and, on November 20, 1928, judgment was entered for the recovery of the full amount sued for, with interest and costs (R. 11-14). This decision and judgment of the District Court were expressly made without prejudice to the defendant to bring a separate action for loss resulting from the failure to present the check within a reasonable time (R. 13). Thereafter petitioner moved for new trial and for leave to interpose in this action a counterclaim for damages for negligent failure to

properly present the check. These motions were denied (R. 46-48), and thereafter appeal was taken from the judgment to the Circuit Court of Appeals for the Eighth Circuit (R. 78-87).

The Circuit Court of Appeals for the Eighth Circuit, on November 15, 1929, rendered its decision and entered judgment affirming the District Court (*Fullerton Lumber Company vs. Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 36 F. (2d) 180). Its opinion quotes the language of the District Court with approval, on the main point in the case, and with respect to the filing of counterclaim recognizes the conflict in the decisions of the District Courts, upholding the decisions disallowing it and overruling those permitting it. No distinction is made between counterclaims unrelated to the cause of action sued upon and those growing out of the very matter for which action is brought.

Importance of the Case.

The decision of this case by this Court will settle the question whether the general, if not well-nigh universal, practice of paying freight bills by check, of making remittances of money for such payment, by check, is a wrongful practice. It will settle the question whether a common carrier is exempt from the ordinary responsibilities of individuals in dealing with checks which it has accepted. It will resolve the uncertainty and confusion which are the natural result of the two decisions of the Courts below in this case. It will indicate this Court's views on the question whether the rule against discrimination prevents the assertion in actions for freight charges of counter-claims for damages growing out of the negligent or wrongful acts of the carrier which directly concern or affect steps which the shipper has taken to

make payment of such freight charges. It will determine the question whether, in this third decade of the twentieth century, a freight bill cannot be properly and safely paid unless the shipper obtains a bag of gold and transports it to the carrier's vaults. These are important and practical questions to the whole business community.

The Essential Error of the Decision of the Circuit Court of Appeals.

Not only do the questions involved deserve to be decided by this Court, but the decision of the Circuit Court of Appeals is in error and should be reversed by this Court.

Assuming the Interstate Commerce Commission Ruling 207 to be correct, it does not follow that the carrier, which by its own act has prevented the shipper's hand from effectually reaching his money drawer, is absolved from responsibility therefor. Both opinions seem to admit this, but nevertheless they proceed to a conclusion protecting the carrier and allowing it to recover, when there is in fact no logical necessity for reaching such conclusion (R. 13, 1st and 2nd full paragraphs from bottom of page; 36 F. (2d) 180, 181). If the shipper is to be allowed to sue in a separate action for the wrongful handling of the check, it is error to deprive him of the right to assert that responsibility in this action *for that wrong goes to the very matter in issue in this action and is a complete answer to and explanation of the default alleged in the cause of action sued upon.*

Novelty of the Case: Conflict of Decisions.

The question whether a carrier can recover the amount of a freight bill when it has failed to properly present a check previously received in payment thereof has never, we believe,

been decided by a Federal Court prior to the decisions of the District Court and Circuit Court of Appeals in this case. In the state District Court of Pocahontas County, Iowa, in the case of *Chicago, Rock Island & Pacific Railway Company vs. Fullerton Lumber Company*, the issue was decided against the carrier on facts practically identical with those in the case at bar. This decision, unreported, is dated October 20, 1928. It was not appealed to the state Supreme Court. In *Chicago, Milwaukee & St. Paul Railway Company vs. Bradshaw*, tried in the state Circuit Court of Brule County, South Dakota, in an unreported opinion dated June 25, 1928, the decision was in favor of the carrier and was not appealed to the state Supreme Court, but it is probable that that case was not contested by the shipper and was in effect settled by stipulation.

The general question whether a counter-claim can be set up in an action for freight charges was decided favorably to the shipper in *Wells-Fargo & Co. vs. Cuneo* (D. C. S. D. N. Y., Judge Mayer), 241 Fed. 727 (in which Judge Mayer refused to follow *C. & N. W. Ry. Co. vs. Stein*, 233 Fed. 716, and *Illinois Central R. R. Co. vs. Hoopes*, 233 Fed. 135, to the contrary); *C. & N. W. Ry. Co. vs. Tecktonius Mfg. Co.* (D. C. E. D. Wis., Judge Geiger), 262 Fed. 715; *Payne vs. Clarke* (D. C. S. D. Cal., Judge Bledsoe), 271 Fed. 525; *Battle vs. Atkinson*, 9 Ga. App. 488, 71 S. E. 775; *Central, etc., vs. Birmingham, etc.*, 9 Ala. App. 419, 64 So. 202; *Nashville, etc., vs. Tennessee Mill Co.*, 143 Tenn. 237, 227 S. W. 443; *Penn. R. R. Co. vs. Bellinger*, 101 Misc. Rep. 105, 166 N. Y. S. 652; *N. Y. Central R. Co. vs. Federal Sugar Refining Co.*, 201 App. Div. 467, 194 N. Y. S. 467.

In the Tecktonius case, the counter-claim appears to have been for damages for goods lost on shipments other than the shipment in question. In the other Federal cases above cited

favorable to the counter-claim, the counter-claim was for damages to the very shipment for which freight charges were sought to be collected.

In the following cases, the question of counter-claim was decided unfavorably to the shipper: *Illinois Central R. Co. vs. Hoopes* (D. C. S. D. Iowa, Judge Wade), 233 F. 135 (counter-claim for negligent transportation of the shipment); *C. & N. W. R. Co. vs. Stein* (D. C. Neb., Judge Munger), 233 F. 716 (counter-claim for negligence in transportation causing damage to the shipment); *Johnson-Brown Co. vs. Railroad* (D. C. S. D. Ga., Judge Speer), 239 F. 590 (counter-claim for damages for negligent transportation of the shipment); *Oregon-Washington Railroad & Nav. Co. vs. Cascade Contract Co.*, 101 Ore. 582, 197 P. 1085, 1088, 200 P. 1034; *D. L. & W. R. R. vs. Nuhs*, 93 N. J. Law, 309, 111 A. 223; *Adams Express Co. vs. Albright Bros.*, 75 Pa. Super. Ct. 410; *N. Y. S. W. R. R. Co. vs. Ruthren*, 88 Pa. Super. Ct. 510.

The extent of the conflict in the decisions, and the uncertainty of the law in the Federal Courts, prior to the decision in the case at bar, is stated by Judge Cochran in *Pennsylvania R. R. Co. vs. South Carolina Produce Assn.*, 25 F. (2d) 315, as follows:

> "There is no decision directly in point by the Supreme Court of the United States, nor by any of the Circuit Courts of Appeals, and the decisions of the District Courts and of the state courts are in hopeless conflict."

In such a situation, and in view of the practical importance of the questions involved, it would seem that there is a manifest practical necessity of a decision by this Court to settle not alone this case, but to lay down for future guidance of the Courts of the country the proper rules to apply

in respect to the shipments in interstate commerce shown to be involved. The Interstate Commerce Act of February 4, 1887, as amended by subsequent acts (U. S. Cod, Tit. 49, Section 6, Paragraph 7, 49 U. S. C. A., Section 6 (7), Comp. St. Section 8569 (7), is directed at discrimination and does not in terms or in substance determine the matter.

STATEMENT OF THE CASE.

The case was an action at law tried to the Court without a jury, a stipulation having been signed and filed waiving jury trial (R. 8-9). The facts are not substantially in dispute and there was very little, if any, conflict in the evidence presented.

The respondent is a railroad corporation of the State of Wisconsin and is a common carrier of freight with its connecting lines from Norfolk, West Virginia, to Kimball, South Dakota. The petitioner is a corporation, a resident of the State of South Dakota, having its principal headquarters at Minneapolis, Minnesota, and conducting one of a line of yards at Kimball, South Dakota (R. 1-2, 4-5).

On June 9, 1926, the carload of coal in question, containing 104,000 pounds of coal, was delivered to the initial carrier at Norfolk, West Virginia, and consigned to the Fullerton Lumber Company at Kimball, South Dakota, over the lines of the respondent railroad company as the last or final carrier. It was admitted that the transportation took place substantially as alleged by respondent (R. 3). The car was Norfolk & Western car No. 93360, originally delivered to the Norfolk & West Virginia Railroad, for transportation over its line of railway and its connecting common carriers in interstate commerce (R. 3).

When the case duly came on for trial before Judge Dewey,

without a jury, Forest T. Gustafson, the Milwaukee agent at Kimball, was called by respondent as its first witness (R. 15), and he testified to the shipment, that the car was delivered at the Fullerton Lumber Company yard at Kimball on June 17, 1926, and unloaded on the 19th, that he presented the freight bill for payment between the hours of two and three in the afternoon of June 19, 1926, to Mr. Yarosh, the Fullerton agent at Kimball, that Yarosh paid it by giving a Fullerton Lumber Company check for $375.96 upon the Lumbard State Bank of Kimball, and he thereupon receipted the freight bill as paid and gave it to Yarosh (R. 16).

Instead of presenting the check for payment at the bank upon which it was drawn, at Kimball, on that same day, or before the close of business on the next business day, Monday, June 21st, the Railway Company's agent, Gustafson, sent the check by express, with other collections, on the east-bound 10:35 Sunday morning Milwaukee train, on June 20th, 1926, to Chicago for deposit. The check was not presented for payment at the Lumbard State Bank of Kimball, the bank upon which it was drawn, until June 28, 1926, nine days after it had been delivered to the Railway Company's agent (R. 33), and it was not honored by the bank, although at all times the Fullerton Lumber Company had on deposit sufficient funds to cover it (R. 34), for the reason that about noon on Friday, June 25, 1926, the bank closed its doors (R. 23-28). If Mr. Gustafson, the Milwaukee agent, had immediately obtained from the bank the currency called for by the check, or if the bank had not closed its doors, the check would have been paid when it arrived and the controversy involved in this litigation would not have arisen. The railroad does not deny that an individual is under the duty of presenting the check for payment on the same or next

succeeding business day, but the railroad contends that a ruling of the Interstate Commerce Commission protects it from the effect of the rules of law which ordinarily govern such a situation.

When Yarosh delivered the check to Gustafson, he then and there deducted $375.96 from his bank balance as shown on his stub (R. 39), and Gustafson marked the freight bill "Received payment 6/19/1926, F. T. Gustafson" and delivered it to Yarosh so receipted (Exhibit A, page 51; R. 33, 16).

By this transaction, both parties agreed that the obligation on the freight bill was discharged (R. 16). Gustafson put the check in his cash drawer, treating it as a collection (R. 16). The transaction was duly completed some time prior to 3 P. M., Gustafson returning two blocks to the depot in time to take care of his duties prior to departure of the 3 P. M. west-bound train (R. 23). The Lumbard State Bank was about two minutes' walk, two blocks' distance, from the lumber yard office, was open at the time the check was delivered, and did not close for the day until about an hour after the 3 P. M. west-bound had left (R. 23-24). Gustafson never asked Yarosh for cash or currency in payment of freight charges, taking the check in final payment in the same manner as he had done scores of times before (R. 42), and no question as to the finality of the transaction arose so as to come to the attention of Yarosh until, on June 29, 1926, ten days after the check was delivered, he was for the first time notified that the check had not been paid by the bank (R. 33).

Gustafson was recalled, in an effort to overcome this testimony by Yarosh, but he admitted the conversation substantially as Yarosh related it, except that he tried to deny that embarrassment of the bank was given as one reason for

sending the check down to Chicago, 660 miles away from Kimball and from the bank on which it was drawn (R. 40-41).

John Dickey, assistant treasurer of the Milwaukee at Chicago, was the only other witness who testified on behalf of respondent (R. 27), and he stated that on June 16, 1926, three days before the check was delivered in payment of the freight bill, he had by letter instructed Mr. Gustafson, as local agent at Kimball, to send checks drawn upon local banks there to the Central Trust Company of Illinois at Chicago for deposit.

The testimony of John Dickey, assistant treasurer of the Railway Company, shows that the matter was left much to the discretion of the local agent (R. 28-29; Exhibit 4, page 78), depending upon whether he felt any question about the bank, and this testimony tends to substantiate Yarosh, whose testimony throughout is full, frank and obviously candid and sincere.

No question is, or can be, made in this case as to the authority of the railway agent at Kimball, Mr. Gustafson, to receive the check in payment and receipt the freight bill (see R. 42).

Mr. Yarosh, the Fullerton agent at Kimball, testified on behalf of petitioner that for a long time prior to June 19, 1926, he had, as a uniform practice, paid all freight bills owed to the Milwaukee by check on the Lumbard State Bank of Kimball, that these checks had always been indorsed by Gustafson and presented for payment by Mr. Gustafson on the same or next succeeding business day, and that, on the occasion in question, he had no notice from Mr. Gustafson that the check was to be handled in any different manner (R. 33-35). It is clear that all parties agreed and understood that the freight bill was paid when the check was de-

livered. Mr. Gustafson receipted the bill (R. 16), and some months later the Milwaukee confirmed this understanding by honoring and paying a claim for refund of a portion of the amount paid by giving its draft to the Fullerton Lumber Company (R. 31-32), which draft was paid. This draft was a refund of a portion of the sum of $375.96 previously paid by delivery of the check involved in this controversy.

Mr. Yarosh had been the agent in charge of the Fullerton Lumber Company's yard at Kimball ever since the yard began to be operated by the Fullerton Company, in June of 1922 (R. 32). He had always paid the freight bills by check, such checks had always been accepted by the Railway Company in full and final payment and no question regarding such payment had ever been raised by the Railway Company prior to the case at bar (R. 35).

The check in controversy is No. 738 of the Fullerton Company, for $375.96, and it was dated and delivered on June 19, 1926 (R., Exhibit C, page 55).

Check No. 737, the next preceding one, is also in evidence (R., Exhibit 1, page 59). This check, for $502.70, was dated and delivered on June 15, 1926, four days earlier, and it likewise was accepted in payment of a freight bill (R. 20-22, 34). It covered the freight on two cars of coal (R. 34-35). That check was presented for payment to the Lumbard State Bank of Kimball the same day on which it was drawn and delivered, and it was duly paid on that same day (R., Exhibit 1, page 59).

Thirty-six prior checks, beginning with number 548, for $147.15, dated and delivered June 11, 1925, to and including number 724, for $2.38, all drawn on the Lumbard State Bank of Kimball by Fullerton Lumber Company and made payable to the Railway Company, and delivered to and accepted by the railway in payment of freight charges, are in

evidence (R., Exhibit 2, pages 60-77). These checks cover all of the transactions between the Railway Company and the Fullerton Company for more than a year prior to June 19, 1926. In not one of these transactions was any question ever raised by the railway company as to the manner of payment; ever since 1922 this was the manner and medium by which freight charges were paid, in these transactions between these two parties, and never at any time did the Railway Company raise any question as to the propriety of this method of payment. It is the common and the usual manner of payment under modern business conditions. All of these checks show presentation for payment before the close of the next succeeding business day.

The Fullerton Company had ample funds on deposit at the Lumbard State Bank to cover its check (R. 34), and Yarosh could himself have gone to the bank and obtained bank notes, gold or silver certificates, legal tender notes or greenbacks, or gold or silver, whatever Gustafson required, upon his check. But Gustafson was willing to and did accept the check and himself undertake to get the currency upon it. As Gustafson wrote under date of July 12, 1926, in his letter addressed to the Fullerton Lumber Company at Minneapolis:

> "In regard to the returned 'unpaid' check—$375.96, needless to say that I am very sorry this happened and of course had we known what was going to happen we could have probably avoided this trouble. It surely makes a bad mess of it" (R., Exhibit 3, page 77; R. 24-25).

As soon as he learned that the check had not been promptly presented and had not been honored, which was ten days after its delivery, and on June 29, 1926, Yarosh immediately

took the matter up with Gustafson. He testified as follows:

"Q. When did you first learn that the check had not been paid by the bank?

A. On June 29.

Q. What did you do when you received that notice?

* * * * * * * * *

A. I went right down to the depot to see Mr. Gustafson.

* * * * * * * * *

A. I asked Mr. Gustafson what he did with our check.

Q. Meaning this check, Exhibit C?

A. Yes, and Mr. Gustafson told me that he sent it to Chicago. I asked him what he did that for and he told me that he didn't want to embarrass the bank. I told him why didn't he say something, I could have got him the cash from the bank" (Yarosh, R. 33-34).

Again, Yarosh testified with respect to who was to go and get the currency as follows:

"Q. On the 19th day of June, 1926, did Mr. Gustafson say anything to you about currency in payment of the freight bill? Did he ask for currency?

A. No, sir.

Q. Did he at any previous time?

A. No, sir.

Q. Nothing was ever said by him about currency?

A. No, sir.

Q. He never demanded cash, or currency, from you in payment of freight bills?

A. No, sir" (Yarosh, R. 39).

Contention of Petitioner.

Petitioner insists:

(1) That the Court should have entered judgment in favor of petitioner, that respondent take nothing by its action, and for costs and disbursements.

(2) That when the carrier's agent took the check, it was thereafter within his power to obtain the currency upon it, and that thereafter it was not within the power of the Fullerton Company's agent to deal with or obtain currency upon the check.

(3) That after taking the check it was the duty of the carrier's agent to go directly to the bank and obtain currency upon it.

(4) That, by reason of his failure to do this and of his affirmative act in sending the check on a nine days' journey to Chicago, he, and he alone, prevented the act of making and delivering the check from successfully resulting in the transfer of greenbacks or gold from the Fullerton Company to the railroad.

(5) That there is nothing in paragraph 7 of Section 6 of the Interstate Commerce Act (U. S. Code, Tit. 49, Sec. 6, Paragraph 7, 49 U. S. C. A., Sec. 6 (7)) which affects the question; or which relieves the carrier from the necessary consequences of its own acts.

(6) That Interstate Commerce Commission Conference Ruling No. 207, providing that freight bills shall be paid in money, does not govern the case.

(7) That there is no Federal law precluding the use of checks as a mechanism for remitting money, nor abrogating

the responsibilities of a holder of a check as determined by common and statute law.

(8) That there is no Federal law providing in terms or by implication that freight bills can only be paid by the immediate transfer of greenbacks, gold or silver.

(9) That to deny the right of counter-claim to petitioner, to be asserted in this action, greatly prejudices petitioner, and in substance allows respondent recovery on a cause of action which could not exist apart from respondent's own wrong. In any separate action to recover damages for that wrong, the evidence would be identical with the evidence in the case at bar.

(10) That the authorities cited in the opinions of the courts in this case opposing allowance of counter-claim do not involve the *kind* of counter-claim presented in the case at bar.

SPECIFICATIONS OF ERROR.

Petitioner now files the following as its assignment or specification of errors:

Petitioner complains that the following errors were committed by the United States Circuit Court of Appeals for the Eighth Circuit:

(1) The Circuit Court of Appeals for the Eighth Circuit erred in affirming the judgment of the District Court and in entering its judgment, dated November 15, 1929, to that effect, said judgment of the District Court so affirmed being as follows:

> "It is therefore the judgment and order of the Court that the plaintiff have and recover as against the defendant a judgment in the sum of $375.96, with interest

thereon at six per cent from June 25, 1926, and costs of this suit. To all of which plaintiff excepts" (R. 13-14).

(2) The Circuit Court of Appeals for the Eighth Circuit erred in holding that the respondent was entitled to recover the amount claimed in the summons and complaint herein.

(3) The Circuit Court of Appeals for the Eighth Circuit erred in holding that the evidence and facts found by the District Court compelled the judgment.

(4) The Circuit Court of Appeals for the Eighth Circuit erred in approving the conclusions stated by the trial court in its opinion, as quoted in the opinion of the Circuit Court of Appeals.

(5) The Circuit Court of Appeals for the Eighth Circuit erred in approving the following finding of the District Court:

> "The foregoing rule of the Interstate Commerce Commission (referring to Interstate Commerce Commission Conference Ruling 207) has the force and effect of United States statute, and it must follow that the payment of the check was unlawful and that the plaintiff herein is entitled under the law to recover in this suit the charges for the freight which have never been legally paid. *L. & N. Ry. Co. vs. U. S.*, 219 U. S. 468; *N. Y. C. & H. R. R. Co. vs. Gray*, 239 U. S. 583; *Eggleston vs. Plowman* (S. D.), 207 N. W. 981" (R. 13).

(6) The Circuit Court of Appeals for the Eighth Circuit erred in not reversing the denial by the District Court of petitioner's motion for amended findings, which motion came on to be heard on February 2, 1929, and which denial by the District Court was as follows:

"In so far as said motion for amended findings asks that the Court find that said bill for freight, involved in this action, was duly and legally paid, the said motion for amended findings is denied and the Court adheres to its views as set forth in said findings and decision, dated November 20, 1928, that said freight bill was not legally paid by said check therein referred to" (R. 48).

(7) The Circuit Court of Appeals for the Eighth Circuit erred in not reversing the denial by the District Court of petitioner's motion for a new trial of said action as set forth in the motion papers, dated January 5, 1929, which motion came on to be heard on February 2, 1929, and the Court should have reversed the ruling of the District Court and should have ordered the granting of petitioner's motion for a new trial on the ground that the findings, judgment, decision and order of said District Court, filed November 22, 1928, are not justified by the evidence and are contrary to law (see R. 46).

(8) The Circuit Court of Appeals for the Eighth Circuit erred in not reversing the ruling of the District Court denying petitioner's motion to amend its answer so as to include therein a counter-claim for damages for respondent's negligence in not properly dealing with or presenting for payment the check involved in said action, and the Circuit Court of Appeals for the Eighth Circuit erred in not vacating and annulling the judgment of the District Court and in not ordering the granting of a new trial upon said issues of negligence and damage, to the end that the damage caused to petitioner by the negligence of respondent, arising out of the same transaction, might be determined and set off against any amount which might be found to be due to

respondent upon said freight bill, if the theory of the decision of the District Court be approved; that the evidence introduced upon the issues in this action conclusively showed said negligence and damages and the reservation and qualification stated by the District Court in paragraph twelve of its said decision, dated November 20, 1928, and filed November 22, 1928, does not adequately protect petitioner's rights to litigate said question of negligence and damages and a just decision of this cause requires more effective and adequate safeguard of the right to litigate said question of negligence and damages if the decision that said freight bill was not paid be adhered to; that a separate action for damages as allowed in the decision of said District Court and as affirmed by the decision of said Circuit Court of Appeals would not be effective to protect petitioner's rights in the premises (see R. 47-48; 13).

WHEREFORE, The petitioner prays that the judgment herein be reversed and the cause remanded with directions to the Circuit Court of Appeals for the Eighth Circuit to enter a judgment reversing the District Court and directing that Court to enter judgment as prayed for by the petitioner, dismissing said action and awarding petitioner costs and disbursements and in case this be denied by this Court then directing said Circuit Court of Appeals for the Eighth Circuit to enter a judgment reversing the District Court and directing that Court to allow a counter-claim for damages for negligent handling of the check to be pleaded and proved and the amount of said damages set off against any recovery allowed herein.

PRAYER.

Your petitioner now prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit and the Justices thereof, commanding that Court to certify and send to this Court a full and complete record of the transcript and all the proceedings of said United States Circuit Court of Appeals in this cause entitled *Fullerton Lumber Company vs. Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, No. 8572—on the docket of said United States Circuit Court of Appeals, to the end that this cause may be reviewed and determined by this Court.

And your petitioner prays that the certified copy of the record and proceedings of the United States Circuit Court of Appeals for the Eighth Circuit, which is filed as a part of and as an exhibit to this petition, may be treated as a return to said writ of certiorari, and your petitioner prays that it may have such other and further remedies and relief in the premises as to this Court may seem appropriate and in conformity with law, and that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit in this cause and every part thereof be reversed by this Honorable Court and this your petitioner will ever pray, etc.

This is the first application for writ of certiorari in this cause.

FULLERTON LUMBER COMPANY,
BY STANLEY S. GILLAM,
Counsel for Petitioner.

District of Minnesota)
State of Minnesota) ss.
County of Hennepin)

Stanley S. Gillam, being first duly sworn, makes oath that he is the counsel for petitioner in the above cause and that he prepared the foregoing petition, and that the allegations therein contained are true as he verily believes.

STANLEY S. GILLAM.

Subscribed and sworn to before me this 10th day of February, 1930.

Frank E. Norton,
(Notarial Seal) Notary Public,
Hennepin County, Minnesota.

My Commission Expires Feb. 5, 1933.

In my opinion the foregoing petition is well founded in law.

STANLEY S. GILLAM.

Supreme Court of the United States

OCTOBER TERM, 1929.

No.....

FULLERTON LUMBER COMPANY,

Petitioner,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

May It Please The Court:

The official report of the decision below, of the Circuit Court of Appeals, is to be found in 36 F. (2d) 180. The decision of the District Court is unreported, but may be found at pages 11-14 of the printed Record herein.

This Court has jurisdiction to review the judgment of the Circuit Court of Appeals for the Eighth Circuit by virtue of Section 2 of Article III of the United States Constitution. The case involves and arises under a law of the United States. Section 240 of the Judicial Code of the United States, as amended, provides for and allows the method of review herein employed.

The judgment below is printed at the end of the record filed herein, and the date thereof is November 15, 1929. The petition for writ of certiorari herein is filed within three months thereof.

That this case arises under and is based upon the Act to Regulate Commerce, passed February 4, 1887, and amendments thereof and supplements thereto, is shown at pages 2, 13, 79 of the printed Record. We do not admit that this case is or should be governed by that Act. But respondent has sought to make it so governed. The matters so relied upon are paragraph 7 of Section 6 of the Interstate Commerce Act, Title 49 of United States Code, and Interstate Commerce Commission Conference Ruling No. 207. The pertinent paragraph of the Interstate Commerce Act is as follows:

> "No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs" (Tit. 49, Sec. 6, Par. 7).

Interstate Commerce Commission Conference Ruling No. 207 was adopted September 15, 1906, and is as follows:

> "207. Payment for Transportation. Nothing but

money can be lawfully received or accepted in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates of fare in effect at the time, precludes the acceptance of service, property, or other payment in lieu of the amount of money specified in the published schedules."

(See pamphlet publication of I. C. C. Rulings.)

It is these provisions which the Circuit Court of Appeals for the Eighth Circuit and the District Court have applied, at respondent's insistence, to allow recovery herein and to place upon petitioner the burden of loss caused solely by the acts of respondent. Not only is there no direct authority for such an application of them, but there is weighty authority to the contrary.

In *Davis vs. Akron Feed & Milling Company*, 296 Fed. 675, Circuit Court of Appeals, Sixth Circuit, the agent of the railroad company erroneously told the consignee that the freight charges on a shipment had been paid to Chicago. The consignee settled with the consignor on that basis, and allowed him credit for these freight charges. In fact the charges for freight for this part of the haul had not been paid. The consignor had become insolvent so that no collection could be had from him. The carrier then sued the consignee for the unpaid freight charges and the defendant therein set up the defense that it had relied upon the statement made by the carrier's agent, and had a right to rely upon it. The carrier asserted that this was no defense, because under the Hepburn Act it was required to collect all

freight charges and do it in money. The court held in favor of the consignee, that the carrier was estopped from demanding further payment of freight from the defendant. In holding that these common law rules applied, the Court said:

> "If the matter were one wholly between the carrier and the consignee, there would be no question that the carrier's representation would estop it from demanding further payment of freight. While the statute requiring every shipper and consignee of freight to pay the full published scheduled rate is a salutary one for the protection of the public, nevertheless, in construing and enforcing this statute, courts should not wholly ignore private rights. It is equally important that the rights of private individuals should be protected."

And the court in this case went on to say:

> "In this case no presumption obtains that the consignee knew that the freight upon this consignment from Kansas City to Chicago had not been paid. This was not a matter of public knowledge. While the question of legal liability is not free from doubt, *the equities are clearly with the consignee, and we are not impressed that the public interest demands such construction of the law as would make the consignee suffer a loss due to the fault, negligence and misrepresentations of the carrier.*"
>
> *Per Curiam Davis vs. Akron Feed & Milling Co.*, 296 Fed. 675, 677 678, C. C. A., Sixth Circuit, 1924.

The case just cited shows with conclusive effect that the Interstate Commerce Act in its provisions against discrimination in charges does not abrogate the Law Merchant or

deprive a shipper of the benefit of the salutary rule that he is not to be held liable for a non-payment in currency of freight charges caused by the act of the carrier.

In *Pennsylvania R. R. Co. vs. Olivit Brothers*, 243 U. S. 574, an action by a shipper for damages for negligent transportation of carloads of watermelons, the carrier sought to prevent the shipper from recovering as part of the damages the freight charges paid, by recourse to the same section of the Interstate Commerce Act relied upon by respondent in the case at bar. The defence was that such recovery would violate the statutory prohibition against discrimination. This Court overruled the defense, holding it untenable in the absence of a showing of an actual or attempted evasion of the statute. We deem the case at bar similar in its essential questions to the Olivit case.

> "A party to a contract cannot take advantage of his own act or omission to escape liability thereon, hence where he causes or sanctions a breach, he cannot recover damages for non-performance or interpose the breach as a defense to an action on the contract. Under this rule performance of a contract is excused when it is prevented by the acts of the opposite party, or is rendered impossible by him."
>
> 13 *Corpus Juris* 647.

See also:

Stanton vs. N. Y., etc., R. Co., 59 Conn. 272, 22 Atl. 300.

Barton vs. Gray, 57 Mich. 622, 24 N. W. 638.

Hinckley vs. Pittsburgh Bessemer Steel Co., 121 U. S. 264.

Northrop vs. Mercantile Trust Co., 157 Fed. 497.

McElwee vs. Bridgeport Land Co., 54 Fed. 627.

An excellent statement of the rule, covering practically

the situation which we have in the case at bar, is as follows:

> "If a creditor receiving a check is guilty of laches in presenting it, or in giving notice of non-payment, after presentment, and the bank in the meantime suspends payment, he thereby makes it his own, and it operates as payment of his debt; the drawer having funds in the bank at the time of drawing the check, and not having withdrawn them."
>
> 21 *Ruling Case Law*, "*Payment*," Sec. 65, Page 66.

See also the following authorities:

Manitoba Mortgage & Investment Co. vs. Weiss, 18 S. D. 459, 101 N. W. 37.

Tobiason vs. First State Bank of Ashby, 173 Minn. 533, 217 N. W. 934.

Brown v. Cox, 202 Iowa 1244, 211 N. W. 890.

Campbell vs. Shark, 46 Idaho 278, 267 Pac. 459.

Quarles vs. Taylor & Co., 196 N. C. 313, 142 S. E. 25.

A check drawn on a bank and given to that bank in payment of a sight draft is a payment in cash, although no currency or greenbacks or gold or silver actually change hands (*Andrew vs. Hartley State Bank*, Iowa, 1928, 219 N. W. 929). This is true, although a bill of lading is attached and the freight charges thereon must be paid in order to get the goods (*Messenger vs. Carroll Trust and Savings Bank*, 193 Iowa 608, 1922, 187 N. W. 545). As the court said in the case last cited:

> "* * * this method of collection was the full equivalent of the payment of money. * * * We deem it clear that the net result of the transaction of payment by the Swaney Company and the receipt thereof by the collecting bank was the same as though the Swaney Company had drawn the currency into its own hands by means

of check, and had thereupon delivered the same to the collecting bank in payment of the sight draft. Such is the holding of the cited cases."

(*Messenger vs. Carroll Trust & Savings Bank*, 193 Iowa 608, 1922, 187 N. W. 545.)

The rule is that the check is the mechanism or means by which the money is remitted and paid, thus avoiding the inconvenience of going to the bank each time and obtaining a large roll of greenbacks or a heavy sack of silver or gold. The respondent railroad company in this case contends that that mechanism or means cannot be used, that in every case wherein freight charges are concerned the shipper must himself go to the bank and obtain the roll of bills or the sacks of silver and gold and convey them to the agent of the carrier. But the authorities are to the contrary. See, among others, the following:

Montgomery County vs. Cochran, 121 Fed. 17 (C. C. A. Fifth Circuit, 1903).

Bennett vs. Bank of Commerce and Trust Co., 220 Fed. 950 (Dist. Ct., Miss., 1914).

Andrew vs. State Bank of Dexter, 204 Iowa 565, 215 N. W. 742.

Palmer vs. Golden, 127 N. Y. Misc. 187, 216 N. Y. S. 509.

Abeles vs. Garlick, 101 N. J. E. 180, 137 Atl. 853.

In *Montgomery County vs. Cochran*, 121 Fed. 17, an Act of the Legislature of Alabama provided for the issuance and sale of certain county road bonds, and that "the proceeds of said bonds shall be paid over to and kept by the treasurer of said county" and he shall be "responsible for the safekeeping of all of the proceeds accruing from the sale of said bonds which may come into his hands in his official capacity, the same as other county funds or money in his hands as such treasurer."

Cochran, as county treasurer, by one Kohn, his agent, who was in the employ of a banking house, gave the county board a receipt for $111,109.58, proceeds of the bonds, they were immediately sold, and Kohn took therefor the check of the banking house, Josiah Morris & Co., for that amount. He indorsed the check in the name of the county treasurer, made out a deposit slip and deposited the check in the bank to the credit of the county treasurer, Cochran. No money actually passed as between the purchaser of the bonds and the county treasurer. Seventeen days later, the bank closed its doors, and this action was brought against the county treasurer and his bondsman to recover the proceeds on the ground that the treasurer had failed to keep them safely. The defense was that there were in fact no proceeds, because the treasurer had no right to receive anything but coin or bank bills in payment for the bonds, and therefore, that there was no legal payment for them by means of the check. The court held that this contention was unsound, in trenchant language directly applicable to the construction of the ruling upon which respondent herein lays so much stress:

> "Was it the intention of the Legislature that no transactions with the board of revenue and the purchaser of the bonds and the treasurer should be permitted except by the use of coin or bank bills? The statute must be construed in the light of commercial usage and common knowledge of business transactions. The word 'money,' when used as in this statute, does not mean only coin and bank bills. 'Such a construction,' said Lyon, C. J., in *State vs. McFetridge*, 84 Wis. 473, 515, 54 N. W. 1, 10, 998, 20 L. R. A. 223, 'would be extremely technical, and is, we think, uncalled for. "Money" is a generic term and may mean not only legal tender coin and currency, but also any other circulating medium, or any instru-

ments or tokens in general use in the commercial world as the representatives of value.' And it was held that a certificate of deposit was money within the meaning of a statute. In *Taylor vs. Robinson* (D. C.), 34 Fed. 681, Judge McCormick said: 'The term "money" is used to designate the whole volume of the medium of exchange recognized by the custom of merchants and the laws of the country, just as the term "land" designates all real estate.' In *Allibone vs. Ames*, 9 S. D. 74, 81, 68 N. W. 165, 167, 33 L. R. A. 585, the court applies this definition to a certificate of deposit: 'When the certificate of deposit was delivered to plaintiff, and accepted by him, it had all the characteristics of money. Its return to the bank must be regarded as a deposit of that amount of currency. It was, the parties so treating it, precisely the same as if the treasurer had received the coin and again deposited it. To say that if a person deposits a draft or certificate of deposit with a bank, and receives credit for the amount of it, he does not make a deposit of that amount, is simply absurd, in view of the modern methods of transacting business.'

"And there are other authorities to the same effect, showing that the words 'funds or money' and 'proceeds of sale,' as used in the act, should not be confined in their meaning to coin and bank bills. *State vs. Krug*, 12 Wash. 288, 41 Pac. 126; *Byrom vs. Brandreth*, 16 L. R. Eq. Cases, 175; *State vs. Hill*, 47 Neb. 456, 66 N. W. 541; *People vs. McKinney*, 10 Mich. 55; *Bork vs. People*, 16 Hun, 476.

"The use of checks, certificates of deposit, and other commercial instruments is so universal and so essential in large transactions that we cannot assume that the Legislature of Alabama meant to forbid their use in the

negotiation and sale of the bonds. If Josiah Morris & Co. had had the coin on hand to pay for the bonds in question, the transaction would have been conducted by the use of checks or certificates of deposit, and we think without any violation of the terms of the statute. If silver coin had been in bank as the basis of the transaction, its weight (about 6,456 pounds) would have made the use of checks or certificates necessary to conveniently complete the transaction. We think, therefore, that checks or certificates of deposit received in good faith by the board of revenue, and delivered to the treasurer, or delivered by direction of the board of revenue to the treasurer, would be 'funds or money' or the 'proceeds of sale' of the bonds in the hands of the treasurer. The check for the price of the bonds in the hands of the treasurer, he having receipted for the same as money, was 'funds or money' in his hands, within the meaning of the statute. * * *"

Per *Shelby*, Cir. J., *Montgomery County vs. Cochran*, 121 Fed. 17, 21-22.

If this reasoning of the Circuit Court of Appeals of the Fifth Circuit is correct, and we have every reason to believe that it is, there is no basis whatever for respondent's contention, upon the soundness of which its whole case rests, to the effect that the Interstate Commerce Commission ruling requires payment of freight bills in gold or silver coin or greenbacks. So technical and narrow a definition of the term money is unsound and unauthorized, and is wholly unsuited to and out of touch with the current of modern commercial life.

CONCLUSION.

We therefore submit that the Circuit Court of Appeals for the Eighth Circuit instead of affirming the judgment of the District Court should have reversed the same and remanded the case to the District Court with directions to enter judgment in favor of petitioner, and that in consequence the judgment entered by the Circuit Court of Appeals is erroneous and should be reversed.

Respectfully submitted,

STANLEY S. GILLAM,
Attorney for Petitioner.